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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN RADDATZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-24a) is reported at 592 F.2d 976. The memorandum orders of the district court (Apps. D and E, *infra*, 29a-34a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 25a-26a) was entered on February 6, 1979, and a petition for rehearing was denied on May 4, 1979 (App. C, *infra*, 27a-28a).[1] On May 31, 1979, Mr. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 28 U.S.C. 636(b)(1)(B), which allows a district court to decide a suppression motion based on the record developed before a magistrate and the magistrate's proposed findings of fact and recommendations, violates the Due Process Clause.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. 28 U.S.C. 636(b)(1) provides in pertinent part:

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[1] The court of appeals issued a corrected copy of the order denying rehearing on May 22, 1979.

> Notwithstanding any provision of law to the contrary—
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion * * * to suppress evidence in a criminal case * * *. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A) * * *.
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or

recommit the matter to the magistrate with instructions.

STATEMENT

Following a bench trial on a stipulated record in the United States District Court for the Northern District of Illinois, respondent, a previously convicted felon, was convicted of unlawfully receiving a firearm, in violation of 18 U.S.C. 922(h).[2] Respondent was sentenced to five years' imprisonment, all but six months of which was suspended in favor of four and a half years' probation (App. A, *infra*, 1a n.1).

1. Prior to trial, respondent moved to suppress several incriminating statements that he had made to agents of the Bureau of Alcohol, Tobacco and Firearms on the ground that the statements had been induced by promises of immunity in return for his cooperation. Over respondent's objection, the district court referred the suppression motion to a magistrate for an evidentiary hearing in accordance with the Federal Magistrates Act, 28 U.S.C. 636(b)(1)(B) (App. A, *infra*, 4a).

The evidence adduced at the suppression hearing showed that on August 8, 1976, two Chicago police officers arrested respondent, who was holding a pistol, for unlawful use of a weapon. Lying near respond-

[2] The parties agreed to allow the court to try respondent on the basis of the transcript of the suppression hearing, the statements of three witnesses, and the stipulations that respondent had previously been convicted of eight felonies and that the firearm in question had been manufactured in Florida (App. F, *infra*, 35a-38a).

ent at the time of the arrest was another man, Jimmy Batson, who was bleeding from the left side of his head. Although Batson claimed that he had injured himself in a fall to the curb, respondent, after being informed of his constitutional rights, admitted that he had been fighting with Batson over a family matter and that he had brought a gun with him to protect himself in case any of Batson's friends tried to intercede on Batson's behalf. In October 1976, the State of Illinois filed a charge against respondent arising out of the August 8 incident (Apps. A and F, *infra*, 2a-3a, 35a-36a; Tr. 3-21, 28-29, 155-157, 249).

One month later, on November 19, 1976, Agents Paul Russell and Richard McCulloch of the Bureau of Alcohol, Tobacco and Firearms went to respondent's home to interview him about the pistol that was in his possession at the time of his arrest. The agents knew that respondent had previously been convicted of a felony. After informing respondent of his *Miranda* rights and ascertaining that he understood those rights, the agents told respondent that the gun in question had at one time been owned by a West Virginia man who had been slain in an unsolved homicide. The agents sought to establish the gun's chain of possession since that time.[3] Respondent remarked that he had seized the pistol from Batson during the altercation on August 8 and that he

[3] In addition, one of the officers testified that they also were "trying to determine venue; where [respondent] had come into receipt of the firearm * * *" (Tr. 225).

did not know how Batson had acquired the weapon (Apps. A and F, *infra*, 3a, 36a; Tr. 33-35, 38-42, 106-107, 160-169, 174-178, 196, 225).

The agents testified that during the November 19 meeting they told petitioner that if he was able to find out where Batson had obtained the pistol, they would inform the United States Attorney of respondent's cooperation in the event he was subsequently prosecuted. Agent Russell left his name and telephone number with respondent in case respondent decided to cooperate. The agents denied that they ever told respondent that he would not be prosecuted if he became an informant and aided their investigation (App. A, *infra*, 6a-7a; Tr. 42, 45, 161, 165, 187-188, 221). Respondent, on the other hand, contended at the suppression hearing that the agents had promised that he would not be prosecuted if he cooperated with them and that he would face a long jail sentence if he refused to cooperate (Tr. 103-108).

On January 12, 1977, respondent called the agents and requested a meeting. The agents picked respondent up at his home and drove him back to their office. After the agents had again informed respondent of his *Miranda* rights, he retracted his prior explanation of how he had obtained the gun. This time respondent stated that he had received the pistol from his half-brother and another individual, who were both involved in gun-dealing activities. At respondent's request, the agents paid respondent $10 to enable him to find the persons who had supplied him with the gun. Following this meeting the agents

accompanied respondent in an unsuccessful attempt to purchase firearms (Apps. A and F, *infra*, 3a-5a, 36a-37a; Tr. 37, 162, 199-200, 228-230).

Respondent admitted at the suppression hearing that he had made the inculpatory statements of January 12 and also acknowledged that he had given a false story to the agents on November 19. He claimed, however, that prior to telling the agents the truth on January 12 he had confirmed that the agents' alleged offer of immunity was still in effect (App. A, *infra*, 5a; Tr. 110-113, 123).

Finally, the testimony at the hearing revealed that respondent returned to the agents' headquarters on January 14, 1977, accompanied by his former wife. At that time Agent McCulloch informed respondent that his case had been referred to the United States Attorney for prosecution. Respondent stated that he was willing to work as an informant but that he had no money to travel about and pick up information. Agent McCulloch then gave respondent $50. Respondent thereafter never produced any information, arranged any firearms transactions, or otherwise acted as an informant (App. A, *infra*, 5a-6a; Tr. 201-203, 207, 223-224, 237, 243-247, 248).[4]

2. After holding the evidentiary hearing and considering the parties' written and oral submissions, the magistrate filed proposed findings of fact and recommendations for the disposition of respondent's

[4] The state charges against respondent were dismissed on February 22, 1977. Respondent's federal indictment was filed on March 1, 1977.

suppression motion in accordance with 28 U.S.C. 636(b)(1)(B) and (C). The magistrate found that respondent knowingly, intelligently and voluntarily made inculpatory statements on three separate occasions, after being informed of his *Miranda* rights on each occasion. Moreover, the magistrate expressly found that the testimony of the ATF agents was more credible than the story offered by respondent, and he specifically rejected respondent's claim that the agents had promised him immunity from prosecution in return for his cooperation. Accordingly, the magistrate recommended that respondent's motion to suppress his statements of August 8 and November 19, 1976, and January 12, 1977, be denied (App. G, *infra*, 39a-41a).

3. Respondent filed objections to the magistrate's report with the district court. Pursuant to 28 U.S.C. 636(b)(1), the district court made a *de novo* determination of respondent's suppression motion based on a review of the transcript of the evidentiary hearing before the magistrate, the magistrate's proposed findings and recommendations, and the oral and written arguments of counsel. The court agreed with the magistrate that respondent had voluntarily chosen to make statements to the agents on the three days in question, and it therefore denied the motion to suppress (App. E, *infra*, 33a-34a).[5]

[5] The district court also denied respondent's motion to dismiss the indictment. Respondent claimed that he should have been charged with violating 18 U.S.C. App. 1202(a), rather than Section 922(h), because the two statutes overlap and

4. The court of appeals reversed and remanded (App. A, *infra*, 1a-24a). The court first addressed respondent's statutory claims. It concluded that both the local court rules[6] and 28 U.S.C. 636(b)(1)(B) authorized the reference of respondent's suppression motion to a magistrate. In addition, in reliance on the language and legislative history of Section 636(b), the court held that the trial judge's decision to deny respondent's motion to suppress after reviewing the transcript of the evidentiary hearing, the magistrate's report, and the submissions of the parties, but without hearing the live testimony itself, did not constitute an abuse of discretion under the statute (*id.* at 8a-14a).

The court of appeals then addressed respondent's constitutional arguments based on Article III and the Due Process Clause. The court found that, because the statute requires the district court to make a *de novo* determination of any disputed portion of the magistrate's report or proposed findings or recommendation, reference of a suppression motion to a magistrate in accordance with Section 636(b)(1)(B) is not an unconstitutional delegation of judicial authority in violation of Article III (App. A, *infra*,

the former carries a lesser maximum penalty than the latter. See App. D, *infra*, 29a-31a. See also *United States* v. *Batchelder*, No. 78-776 (June 4, 1979).

[6] Local Magistrate Rule 1.01B(8) of the United States District Court for the Northern District of Illinois provides that a federal magistrate may assist the district court "in the conduct of pretrial proceedings" in a criminal case. The court of appeals construed this rule to cover the reference of a motion to suppress.

14a). The court of appeals held, however, that a district court's failure to defer to the magistrate's proposed fact findings in connection with a motion to suppress—which the statute does not permit (see note 8, *infra*)—deprives a defendant of due process, unless the district court itself hears the controverted testimony. In the court of appeals' view, at least where "credibility is crucial to the outcome," a "district court cannot constitutionally exercise its discretion to refuse to hold a hearing on contested issues of fact in a criminal case" (*id.* at 24a). The court therefore remanded for another suppression hearing to be conducted personally by the district court judge (*id.* at 15a-24a).

The court of appeals denied the government's petition for rehearing en banc on May 4, 1979, with two judges dissenting (App. C, *infra*, 27a-28a & n.*).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the constitutionality of the Federal Magistrates Act, 28 U.S.C. 636(b)(1)(B). The court of appeals held that, although Section 636(b)(1)(B) provides that a district court may decide a suppression motion based on a review of the transcript developed before the magistrate, the magistrate's proposed findings and recommendations, and the submissions of the parties, the Due Process Clause nonetheless requires the district court to hear anew the testimony of the witnesses, at least where "credibility is crucial to the outcome" of the motion. The court of appeals has thus declared an Act of Congress unconstitutional as

applied in this case, and as a result it has substantially limited the usefulness of magistrates in the federal courts. Moreover, the court's holding conflicts with the decisions of other courts of appeals that have sustained the use of magistrates in similar situations. In these circumstances, review by this Court is warranted.[7]

1. The court of appeals correctly concluded that the Federal Magistrates Act, 28 U.S.C. ~~~~636(b), provides for the kind of reference that occurred here. Section 636(b)(1)(B) states that the district court may "designate a magistrate to conduct hearings, including evidentiary hearings," regarding pretrial matters pending before the court, including a motion to suppress evidence in a criminal case.[8] Following the evidentiary hearing, the magistrate is required to submit to "the court proposed findings of fact and recommendations for the disposition" of the motion. Within 10 days, the parties may file written objections to the magistrate's report. Thereafter the district court

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[7] Indeed, if the court of appeals had rendered this decision in a civil proceeding involving the United States, the government would have had a right of appeal to this Court. See 28 U.S.C. 1252; *Fleming* v. *Rhodes*, 331 U.S. 100 (1947).

[8] Section 636(b)(1)(A) covers all magistrate references in pretrial matters except for certain enumerated motions such as motions to suppress. If the reference falls within subsection (A), the magistrate's determination is final and binding on the district court unless shown to be "clearly erroneous or contrary to law." *Ibid.* Matters excepted from subsection (A) may be referred to a magistrate for hearing under subsection (B), but as to those matters the district court may not defer to the magistrate's findings.

"shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." The legislative history of this provision makes clear that the court's obligation to decide the matter *de novo* does not include a requirement that it rehear the testimony adduced at the hearing before the magistrate:

> The use of the words "de novo determination" is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate.

H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976). See also 122 Cong. Rec. H12219 (daily ed. Oct. 1, 1976) (remarks of Rep. Railsback); *White* v. *Estelle*, 556 F.2d 1366 (5th Cir. 1977); *Campbell* v. *United States District Court*, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 879 (1974).

We also agree with the court of appeals that references to a magistrate pursuant to Section 636(b)(1)(B) do not run afoul of Article III of the Constitution. "[T]he enforcement of federal criminal law [has not] been deemed the exclusive province of federal Art. III courts." *Palmore* v. *United States*, 411 U.S. 389, 402 (1973). Non-Article III courts, indeed even non-federal courts, have conducted federal criminal trials. *Id.* at 402-404. Moreover, because under Section 636(b)(1)(B) an Article III judge retains the ultimate adjudicatory power over all pretrial matters, transfer of a suppression motion to a magistrate for hearing and recommendation does not deprive a defendant of any rights protected by Article III. See 411 U.S. at 407-410; *Wingo* v. *Wedding*, 418 U.S. 461, 486-487 (1974) (Burger, C.J., dissenting); S. Rep. No. 94-625, 94th Cong., 2d Sess. 6 (1976). See also *Mathews* v. *Weber*, 423 U.S. 261, 269-270 (1976); Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 780-789 (1975).

The court of appeals erred, however, in concluding that the Due Process Clause requires a district judge, in ruling on a motion to suppress, to hear the testimony that has previously been evaluated by the magistrate. According to the court below (App. A, *infra*, 17a), at least in the context of a criminal case, due process demands that the "judicial fact-finding must be designed to foster a reliable determination of credibility," and "only two procedures [are] adequate to the task"—the trial judge must either "rehear the testimonial evidence" (*id.* at 15a) or must defer in its decisionmaking to the magistrate, who has had the opportunity to observe the witnesses (which the statute does not permit) (*id.* at 17a). But where, as here, the district court has adopted the magistrate's findings, the court of appeals' analysis makes little sense: if the district court had deferred to the magistrate, rather than deciding the matter *de novo*, it obviously would again have accepted the magistrate's findings and would again

have denied respondent's motion.[9] The fact that the district court made a more thorough review of the record and gave respondent a second opportunity to establish *de novo* that his statements should be suppressed cannot offend the Due Process Clause. See *Wingo* v. *Wedding*, *supra*, 418 U.S. at 486-487 (Burger, C.J., dissenting); *Mildner* v. *Gulotta*, 405 F.Supp. 182, 195 (E.D. N.Y. 1975) (three-judge court), aff'd mem., 425 U.S. 901 (1976).

In determining what process is due in particular circumstances, this Court has identified several factors that must be considered (*Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[9] Of course, if the district court had deferred to the magistrate, it is arguable (although we would not agree) that the procedure would not have comported with Article III. Cf. *Ellis* v. *Buchkoe*, 491 F.2d 716, 717 (6th Cir. 1974); *Noorlander* v. *Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973); *TPO, Inc.* v. *McMillen*, 460 F.2d 348, 356-359 (7th Cir. 1972).

[10] In cases where the district court disagrees with the magistrate's findings on a suppression motion that were favorable to the defendant, the Due Process Clause may require the court either to hear the critical testimony itself or to give a detailed statement of reasons for its conclusions. Compare *Campbell* v. *United States District Court*, *supra*, with *United States* v. *Bergera*, 512 F.2d 391 (9th Cir. 1975). This more difficult question is not presented here, since the district court accepted the magistrate's findings.

See also *Mackey* v. *Montrym*, No. 77-69 (June 25, 1979), slip op. at 8; *Parham* v. *J.L.*, No. 75-1690 (June 20, 1979), slip op. at 13-14; *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970). Application of these factors indicates that Section 636(b)(1)(B) is constitutional.

A defendant undoubtedly has a substantial interest in the fairness and outcome of his criminal trial. But it is the deterrence of official misconduct rather than the insurance of a correct determination of guilt or innocence that ordinarily underlies a suppression order. See, *e.g.*, *Lego* v. *Twomey*, 404 U.S. 477, 484-487 (1972); *United States* v. *Janis*, 428 U.S. 433, 454 & n.28 (1976).[11] Accordingly, the process due at a pretrial hearing is considerably less elaborate than the procedural protections that must be accorded a defendant at the actual trial. In a suppression hearing, for example, the government need only establish the admissibility of the challenged testimony by a preponderance of the evidence, the usual burden of proof in civil cases, whereas at trial the prosecution must prove a defendant's guilt beyond a reasonable doubt. See *Lego* v. *Twomey*, *supra*, 404 U.S. at 482-489. Similarly, in ruling on a motion to suppress, the court has discretion to rely upon hearsay evidence that would be inadmissible at trial. See *United States*

[11] Similarly, other pretrial motions that may be referred to a magistrate, such as a motion to dismiss an indictment for pretrial delay, do not ordinarily implicate the guilt or innocence of the defendant but rather involve some overriding soceital goal. See *Barker* v. *Wingo*, 407 U.S. 514, 519 (1972).

v. *Matlock*, 415 U.S. 164, 172-177 (1974); *McCray* v. *Illinois*, 386 U.S. 300 (1967); Fed. R. Evid. 104 (a). Indeed, in other areas, such as administrative procedure, in which the magnitude of the private interest at stake may be quite substantial, the fact-finding procedure normally employed parallels that involved under Section 636(b)(1)(B): an administrative law judge makes initial findings following an evidentiary hearing, and the agency then enters its administrative findings based on a *de novo* review of the written record and the submissions of the parties. See, *e.g.*, 29 U.S.C. 160(c); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 482-497 (1951).

Moreover, "[s]ince the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts," *Lego* v. *Twomey*, *supra*, 404 U.S. at 486,[12] the procedures allowed by Section 636(b)(1)(B) do not present the "risk of an erroneous deprivation of" a defendant's liberty. See *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 335; *Califano* v. *Yamasaki*, No. 77-1511 (June 20, 1979), slip op. at 13.[13] In fact, it is not at all apparent that the substitute procedures mandated by the court of appeals would reduce the chance of an incorrect determination of a suppression motion. Here, for example, respondent was given an opportunity at the suppression hearing to present evidence, cross-examine the government's witnesses, and argue his position both orally and in writing. After the magistrate had entered his findings and recommendations, respondent was allowed to register his objections, submit additional memoranda of law, and present oral argument before the district court. Thereafter, the court issued its decision based on the submissions of the parties, the transcript of the hearing, and the magistrate's report. Although requiring the district court to rehear the testimony might occasionally change the result of the suppression hearing, there is no reason to believe that the final determination would be more accurate. See also *Mackey* v. *Montrym*, *supra*, slip op. at 10-11.

Finally, the court of appeals' conclusion that the trial judge must rehear the testimony at a suppression hearing unquestionably will impose a substantial additional burden on the federal courts. In Fiscal Year 1978, magistrates made recommendations on 1,318 substantive criminal motions pursuant to Section 636(b)(1)(B). *1978 Annual Report of the Director of the Administrative Office of the United States Courts* A-144 (Table M-4). The court's decision will either necessitate two duplicative, full-dress evidentiary hearings or (more likely) eliminate the use of magistrates in many circumstances; either alternative would be contrary to the express

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[12] See also *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965); *Johnson* v. *New Jersey*, 384 U.S. 719, 727-728 (1966).

[13] In *Califano* v. *Yamasaki*, *supra*, the Court construed Section 204(b) of the Social Security Act, 42 U.S.C. 404(b), to require a pre-recoupment hearing because, in part, the determination of waiver under that provision involves an evaluation of credibility. Slip op. at 13-14. Nothing in *Yamasaki* suggests, however, that the *Constitution* requires *two* evidentiary hearings when credibility is involved.

desire of Congress to alleviate the caseload congestion in the district courts. See H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 4-7 (1976); S. Rep. No. 94-625, 94th Cong., 2d Sess. 4-5 (1976).[14] Indeed, the need to hold two hearings with regard to virtually every suppression motion assigned to a magistrate without the defendant's consent not only will burden district judges, counsel, and witnesses, but also will tax other limited resources such as courtrooms and court reporters. Cf. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 260-261 (1973) (Powell, J., concurring). In short, the decision below effectively renders useless this important tool in the administration of justice in a significant number of cases.[15]

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[14] See also S. 237 and H.R. 1046, 96th Cong., 1st Sess. (1979), which are pending bills that would expand further the use of magistrates to assist the district courts.

[15] The court of appeals attempted to limit its holding to suppression motions in which "credibility evidence is central to the determination of a material issue of fact" (App. A, *infra*, 16a). But, as the court quickly conceded (*id.* at 17a), most motions to suppress will involve crucial questions of credibility, especially if the motion requires an evidentiary hearing for its resolution. See, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737, 741 (1966). Indeed, the decision below may have even greater impact than the court acknowledged. In FY 1978, magistrates made recommendations in 8,332 matters involving criminal indictments and conducted 966 probation revocation hearings and 458 hearings on prisoner petitions. *1978 Annual Report*, *supra*, at A-144 to A-145. Because many of these proceedings, which are part of the criminal justice process, involve findings of credibility, the court of appeals' construction of the Due Process Clause might preclude effective use of a magistrate in these cases as well.

2. The court of appeals' decision conflicts with decisions of the Fifth and Ninth Circuits. In *Campbell* v. *United States District Court*, 501 F.2d 196, 205-207 (9th Cir.), cert. denied, 419 U.S. 879 (1974), the court held that a magistrate may constitutionally preside over a pretrial motion to suppress evidence in a criminal case, provided that the district court makes a "*de novo* determination" of the motion. The court was not required to rehear the evidence. Although *Campbell* was decided under the predecessor version of the Federal Magistrates Act, there is no reason to believe that the Ninth Circuit would reach a different result today. Indeed, Congress expressly modeled the 1976 changes in the Act on the *Campbell* opinion, including use of the phrase "*de novo* determination." See H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3-4 (1976).[16]

More recently, the Fifth Circuit (in a case decided under the current statute) has explicitly rejected the position taken by the court of appeals in this case. *United States* v. *Whitmire*, 595 F.2d 1303 (5th Cir. 1979). In *Whitmire*, the court of appeals held that the reference to a magistrate of a suppression motion involving a Fourth Amendment claim did not violate the Due Process Clause, even though it was

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[16] The Ninth Circuit subsequently held that the district court must rehear the critical testimony where it *rejects* findings and recommendations of the magistrate based on credibility determinations. *United States* v. *Bergera*, *supra*. The court of appeals reiterated, however, that where the district court accepts the findings of the magistrate it need not rehear the testimony. *Id.* at 394. Here, of course, the district court agreed with the magistrate's findings and recommendations.

the magistrate who "had a first-hand look at the witnesses and appraised their credibility." *Id.* at 1305. The court expressly acknowledged that its "holding differs with that of the Seventh Circuit in * * * *Raddatz*" (*id.* at 1306 n.1), but it nonetheless concluded that the procedures established by Section 636(b)(1)(B) "provide sufficient safeguards both to ensure the integrity of the factfinding process and retention by the judge of final responsibility for ruling on the motion." *Id.* at 1305. See also *White* v. *Estelle, supra; Parnell* v. *Wainwright*, 464 F.2d 735 (5th Cir. 1972).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1979

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-1350

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HERMAN RADDATZ, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 77-Cr-325—Nicholas J. Bua, *Judge*

Argued November 9, 1978—Decided February 6, 1979

Before CUMMINGS, SPRECHER, and WOOD, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The district court found the defendant, Herman Raddatz, guilty of violating 18 U.S.C. § 922(h), receipt of a firearm in interstate commerce by a convicted felon, and imposed a five year sentence.[1] The Government concedes on appeal

[1] Ultimately the judge modified the sentence to require only six months incarceration, but to be followed by 4½ years probation.

that the sentence imposed was improper under our decision in *United States* v. *Batchelder*, —— F.2d —— (7th Cir. 1978), *cert. granted*, —— U.S. —— (1979).[2]

The defendant argues additionally, however, that the reference of his motion to suppress evidence to a magistrate under 28 U.S.C. § 636(b)(1)(B) violated both the Due Process Clause and Article III of the Constitution. We conclude that the defendant was denied Due Process and accordingly reverse and remand for a new hearing on the motion to suppress before the district court.

I

On August 8, 1976, two Chicago police officers, Monroe Vollick and James Bach, arrested the defendant for unlawful use of a weapon. Officer Vollick testified at trial that just prior to his arrest, the defendant was found standing over a man with a bleeding head injury. The defendant was holding a gun. The bleeding man, Jimmy Batson, told the officers that he had fallen down. Officer Vollick testified that while in custody, Raddatz told the police that he had been fighting with Batson over a family matter.

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[2] Although 18 U.S.C. § 924 authorizes a maximum sentence of five years for violations of § 922(h), another section of the criminal code describes the same offense but authorizes a maximum sentence of only two years. In *Batchelder* we held that, "[i]t is impermissible to sentence a defendant for five years under Section 922(h) when he could receive only a two year maximum sentence under Section 1202(a)." —— F.2d at ——.

The officer further testified that Raddatz stated he had brought the gun with him in case any of Batson's friends were around. A formal state charge was filed against the defendant on October 27, 1976.

Paul Russell and Richard McCulloch, Special Agents for the Bureau of Alcohol, Tobacco and Firearms learned from Officer Vollick that a state firearm charge was pending against the defendant. The agents were also aware that Raddatz was a convicted felon, and that the gun had traveled in interstate commerce (two of the elements necessary for the prosecution in issue).

On November 19, 1976, McCulloch and Russell interviewed Raddatz at his home. After reading *Miranda* warnings to him, Russell told Raddatz that the gun which was recovered from the defendant's possession on August 8 had been traced to its last owner, a victim of an unsolved homicide in another state. The defendant told the agents that he had taken the gun from Batson to pistol-whip him and did not know where Batson had acquired the gun.

On January 12, 1977, the defendant called the firearms agents and requested a meeting. The agents picked Raddatz up and brought him to their office. The defendant there informed the agents that his earlier statement of November 19 was incorrect. He told the agents that he had not taken the gun from Batson and related to them how he had acquired it.

The state charges were dismissed on February 22, 1977. A federal indictment under 18 U.S.C. § 922(h) followed on March 1, 1977. Pretrial motions, includ-

ing a motion to suppress various statements made by the defendant, were filed on May 4, 1977. Over the defendant's objection, the district court judge referred the motion to suppress to a magistrate for hearing.

At the hearing before the magistrate, defense counsel attempted to demonstrate that the January 12, 1977 statement of the defendant was involuntary because it was made in reliance on promises of the agents that the case against him would be dismissed if he cooperated.[3] If the agents had promised a dismissal of the indictment in exchange for information about the origins of the gun the statement would in all likelihood be suppressed. *See Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964) (citing the statement of *Bram* v. *United States*, 168 U.S. 532, 542-43 (1897) that the "constitutional inquiry is . . . whether the confession was 'free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . .'"). The January 12 statement was relied upon by the Government to establish two of

[3] The defendant also challenges the admissibility of the statements on alternative grounds. Defendant argues that the waiver of the privilege against self-incrimination is not valid because the agents' version of the events suggests that they intentionally misled the defendant to believe that he was not in jeopardy of prosecution. Defendant also argues that the statements are excludable because his right to counsel was violated at two of the interviews. In view of our ultimate disposition, we need not consider these claims.

the essential elements of the offense, thus underscoring the dispositive character of the motion.

The defense elicited two varieties of evidence to support a finding of inducement: testimony of the promise and of a course of conduct suggestive of a prior promise. The defendant testified that at the November 19 meeting Russell told him that he was going to be indicted by federal prosecutors. If the defendant would cooperate with the agents, however, "somebody would talk to the prosecutor, and it would be dismissed." The defendant further testified that he was advised that otherwise he would be given a lengthy sentence in a federal penitentiary. The defendant stated that his meeting with the agents on January 12 was motivated solely by his decision to take advantage of the agents' offer. He testified that before he gave the corrected statement on January 12, the agents assured him that their offer of November 19 was still good.

The defense also introduced testimony to establish a course of cooperation with the agents to support the inference of a promise. First, it is uncontested that the defendant's January 12 trip to see the agents was unsolicited. On that date he gave them all the information he had about the gun he had used on August 8, implicating his half-brother and another individual in gun-dealing activities. The agents gave him $10 on that date to enable him to locate the people from whom he had obtained the gun. On January 14, the defendant brought his wife with him to the agents' office to discuss again activity as

an informant. McCulloch gave him $50 at that meeting. On a later date, the defendant took McCulloch to an area of the city where he claimed guns were being sold illegally. He also turned over some additional names of possible firearms violators. The defendant, however, never set up a gun sale for the agents.

The defendant claims that this course of conduct circumstantially supports his testimony that a promise had been made on November 19, 1976. He argues that it is not credible to believe that he just casually volunteered this self-incriminating information. Further, he argues that the agents immediately treated him as an informer when he contacted them because that was in accord with the prior agreement they had made.

Although the agents are essentially in agreement with this account of the conduct which transpired, they deny any November 19 promise to obtain dismissal of anticipated charges in exchange for cooperation. Agent Russell supported this contention by stating that as of the November 19 meeting Raddatz was not even an object of investigation. The purpose of the November 19 meeting was to obtain information about the prior ownership of the gun confiscated from Raddatz on August 8, since the gun had been used in an unsolved homicide. Russell stated that he had met Raddatz on only two occasions, November 19 and January 12. At one point in the hearing he denied that he discussed any possibility of cooperation with the defendant on either date. On cross-examination however, Russell stated that he told the defendant on November 19 that if Raddatz would cooperate in locating Batson, Russell would mention the defendant's cooperation to the United States Attorney in the event a case was brought against him. Russell stated that the request for cooperation was limited to assistance in tracing the ownership of the gun and that Raddatz had not been recruited to act as an informant.

McCulloch also testified that no promise was made to Raddatz on November 19. However, McCulloch's testimony varies from Russell's in several respects. First, McCulloch testified that the purpose of their November 19 visit was to obtain the venue information which they needed to initiate a prosecution against Raddatz. He also specifically testified that the agents sought Raddatz's cooperation as an informant at the January 12 meeting and suggested that Raddatz had been told on November 19 that favorable mention would be made to the United States Attorney if he cooperated. Although the agents concede that Raddatz cooperated by giving them information about the gun used on August 8, no mention of this cooperation was made to the United States Attorney. McCulloch explained that the agents did not speak to the United States Attorney on the defendant's behalf because he never gave the type of cooperation they requested—arranging a gun sale.

On the basis of this testimony, the magistrate recommended that the motion to suppress be denied. He specifically stated, "I find the testimony of the

Alcohol, Tobacco and Firearms agents more credible. . . . I find that Federal agents never advised Raddatz that charges against him would be dismissed, if he cooperated." The defendant filed objections to the magistrate's recommendation with the district court. After reading the transcript of the motion to suppress and hearing arguments by both parties the district court overruled the objections and adopted the recommendation of the magistrate. The judge did not hear testimony from the witnesses who appeared at the suppression hearing before the magistrate.

II

The defendant's principal contention on appeal is that his conviction was improper because his motion to suppress was heard before a magistrate and not before the trial court judge. In 1976, Congress amended the United States Magistrates Act to clarify that motions to suppress, as well as a variety of other motions, could be referred to magistrates for a hearing. 28 U.S.C. § 636(b)(1). The amendment was enacted to overrule the Supreme Court construction in *Wingo* v. *Wedding*, 418 U.S. 461 (1974), of Congressional intent as precluding magistrates from hearing motions to suppress.

The defendant argues that despite the clear statutory authorization, the reference in this case was improper on several grounds. The primary contention is that the reference was made in a manner which violated both Article III and the Due Process Clause of the Constitution. In addition, the defendant argues that the reference was invalid because not made pursuant to required enabling rules. The defendant finally suggests that it would be appropriate for this court to exercise its supervisory powers to prohibit the procedure employed in this case. Since it is well established that it is preferable to avoid constitutional adjudication we address the non-constitutional arguments of the parties first.

Section 636(b)(4) of the Act requires that "[e]ach district court shall establish rules pursuant to which the magistrates shall discharge their duties." The defendant argues that the district court did not have the power to refer the hearing on the motion to suppress to a magistrate, because no rule of the district court explicitly provided for this category of reference. He reasons that an explicit rule is required by the statute and that the district court's failure to enact such a rule rendered the reference *void ab initio*, necessitating a new hearing pursuant to valid rules. The local rules enacted in 1975 provide that magistrates are

> authorized to exercise all powers and perform all duties now or hereafter authorized by the Constitution and laws of the U.S., applicable Federal Rules of Civil and Criminal Procedure, local rule, order or regulation.

Loc. Mag. R. 1.01A. The rules further provide:

> Without limiting the general grant of authority in paragraph 1.01A, the U.S. Magistrates in this district are authorized to perform the following duties in criminal cases:
>
> . . . .

> Upon reference by a judge of this court, assist the judge in the conduct of pretrial proceedings including, but not limited to, hearing and ruling upon all discovery motions pursuant to Rule 16 of the Federal Rules of Criminal Procedure and conducting pretrial conferences pursuant to Rule 17.1 of the Federal Rules of Criminal Procedure.

Loc. Mag. R. 1.01B(8). We are not convinced that the rules are so devoid of content as to deprive the lower court of any power to make this reference under the statute. Congress mandated that the district court establish rules. Rules have been established, and those rules can be construed to authorize the reference of a motion to suppress—a "pretrial proceeding"—to a magistrate. Although in some cases the defendant might properly challenge the sufficiency of the rules, this is not such a case. The defendant does not allege any deficiency in the magistrate's discharge of his duties—the subject of the required rules. Thus he cannot establish any prejudice from the failure of the district court to enact more precise standards. The statutory mandate to enact rules was satisfied.

It is also not possible to avoid the constitutional questions presented by resort to our supervisory powers. The defendant requests that this court exercise its supervisory powers to prevent the procedure employed in this case either by prohibiting referral of motions to suppress to magistrates or by requiring the trial judge to rehear the contested evidence presented to the magistrate. Both of these solutions are

unavailable. The appellate courts must be ever wary that it is only appropriate to "supervise" when Congress has not. As the Supreme Court stated in *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 589 (1948), "Our general power to supervise the administration of justice in the federal courts . . . does not extend to disregarding a validly enacted and applicable statute or permitting departure from it. . . ." *See also Palermo* v. *United States*, 360 U.S. 343 (1959); Comment, *Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Powers of Federal Courts*, 72 Nw. U.L. Rev. 595, 622 (1977). In *National City Lines*, the Court instructed that before exercising supervisory power, the court must examine the purpose of relevant statutes to ascertain whether "room was left for judicial discretion" to impose extra-constitutional requirements. 334 U.S. at 588.

The Magistrates Act and its history clarify that this court cannot use the supervisory power to prevent the reference of a motion to suppress to a magistrate or to require the district court judge to personally hear the evidence on a motion that has been referred to a magistrate. The statute is explicit on both issues. Section 636(b)(1) provides:

> (b)(1) *Notwithstanding any provision of law to the contrary*—
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the

pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. . . .

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge *may* also receive further evidence or

recommit the matter to the magistrate with instructions.

(Emphasis added). The House Report accompanying the bill states that although the judge must make a "de novo determination" this "is not intended to require the judge to actually conduct a new hearing on contested issues." *H. Rep. No.* 94-1609, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6163.

The legislative history underscores that this use of the supervisory power would be inconsistent with the purposes of the amendments. Expressly relying on the House Committee on the Judiciary's own responsibility for the "oversight of the federal courts," Congress designed the statute to enable the district court judges, through increased use of magistrates, to "have more time to preside at the trial of cases having been relieved of part of his duties which required the judge to personally hear each and every pretrial motion or proceeding necessary to prepare a case for trial." *Id.* at 6166. *See also id.* at 6173. Although Congress did not prohibit the district court from rehearing evidence presented to the magistrate, the statute invests the *district court judge* with discretion to make that procedural decision. *Id.* at 6162-63. The appellate court can now only review, and not divest, the lower court of that discretion. As in *National City Lines*, we must conclude that the Congressional purpose to broaden the procedural choices of a district judge cannot be "narrowed by applica-

tion of a vague and discretionary power." 334 U.S. at 581.

III

The constitutional questions are dispositive of this appeal. The defendant rests his challenge to the procedure employed in this case on both Article III and Due Process. Although our construction of the statute satisfies Article III, we conclude that defendant's Due Process rights were violated.

Article III requires that the judicial power of the United States be vested in Article III judges. The defendant argues that the Magistrates Act, when applied to allow the reference of a hearing on contested facts, unconstitutionally delegates judicial power to a non-Article III judge. Anticipating potential Article III objections to an expanded role for federal magistrates, Congress resolved to avoid any such objections by requiring that a district court judge "shall make a de novo determination" on contested aspects of a magistrate's recommendation in case-dispositive motions. 28 U.S.C. § 636(b)(1)(C). *See Sick* v. *City of Buffalo*, 574 F.2d 689, 693 n.17 (2d Cir. 1978). The Supreme Court in *Mathews* v. *Weber*, 423 U.S. 261, 270 (1976), emphasized that the statute clearly requires the Article III judge to make a de novo determination. Article III is therefore satisfied. *Sick* v. *City of Buffalo*, 574 F.2d at 693; *Noorlander* v. *Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973).

The trial judge in this case exercised his discretion to make the de novo determination on the basis

of the written record without hearing the witnesses' testimony. Although the statute does not mandate the judge to rehear the testimonial evidence, the Due Process Clause of the Constitution does. We conclude that the procedure employed in this case denied defendant his Due Process right to a meaningful hearing before the trier of fact on his motion to suppress.[4]

There is no question that Due Process guarantees a meaningful hearing and procedures sufficient to ensure a reliable determination of the facts underlying a motion to suppress. *Jackson* v. *Denno*, 378 U.S. 368, 376-77 (1964), *United States* v. *Bergera*, 512 F.2d 391, 393 (9th Cir. 1975). Due Process, however, does not encompass any fixed requirement that the trier of fact personally hear the evidence in every case. Courts have on occasion upheld the constitutionality of decisions rendered by a trier of fact who decided the case on the basis of a transcript. *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967); *Van*

[4] Although we conclude that the procedures employed were insufficient to ensure an accurate de novo determination, we cannot conclude from this record that the judge simply abused his discretion under the statute by not making the required de novo determination. Similarly, although courts have suggested that Article III is only satisfied when the trial court retains and *exercises* de novo decision making power, *see Noorlander* v. *Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973), we do not conclude that Article III was violated. The trial court may well have made a de novo judgment, but we simply do not believe that the judgment was derived from constitutionally adequate procedures.

Teslaar v. *Bender*, 365 F. Supp. 1007 (D. Md. 1973). The command of Due Process is only that the defendant be given a "hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The precise question then is whether the nature of this case necessitates that the trier of fact personally hear the evidence in order to ensure a meaningful determination of the facts. We conclude that it does.

Several aspects of the "nature of this case" demonstrate why the trier of fact must necessarily have heard the evidence himself to guarantee the substantial rights of the defendant. We emphasize that this is a criminal case,[5] tried in an Article III court.[6] The defendant has not consented to the procedure employed by the judge,[7] and credibility evidence is central to the determination of a material issue of fact.

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[5] The nature of the right at stake dictates the degree of procedural precaution due by the judicial system. In criminal cases, the procedural protections must be the greatest. *See, e.g., United States ex rel. Graham* v. *Mancusi*, 457 F.2d 463 (2d Cir. 1972). Thus whether this procedure may satisfy Due Process in some civil cases is a question we need not decide.

[6] *See Rogers* v. *Loether*, 467 F.2d 1110, 1116 (7th Cir. 1972), *aff'd sub nom. Curtis* v. *Loether*, 415 U.S. 189 (1974), suggesting a distinction between procedures required in judicial rather than statutory courts.

[7] A number of courts have upheld references to a magistrate when done with the consent of the parties. *Sick* v. *City of Buffalo*, 574 F.2d 689, 690 n.5 (2d Cir. 1978); *Reciprocal Exchange* v. *Noland*, 542 F.2d 462, 463 (8th Cir. 1976); *De Costa* v. *CBS, Inc.*, 520 F.2d 499, 503-08 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

It is quite clear from the record that in this case credibility is determinative, as in many motions to suppress. *See Brown* v. *Illinois*, 422 U.S. 590, 603 (1975); *Davis* v. *North Carolina*, 384 U.S. 737, 741 (1966). The success or failure of the motion to suppress—and in effect the prosecution itself—depends upon whether the judge believes or disbelieves the defendant's statement that the law enforcement officers promised him that a federal charge against him would be dropped if he cooperated. This is perhaps the most significant factor in determining what fact-finding procedures must be employed.

The nature of the evidence necessary for decision inevitably must affect the type of procedures required to evaluate the evidence. It has been emphasized for decades that judicial fact-finding must be designed to foster a reliable determination of credibility. *Wingo* v. *Wedding*, 418 U.S. 461, 474 (1974); *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970); *Holiday* v. *Johnston*, 313 U.S. 342, 352 (1941). The courts have generally recognized only two procedures as adequate to the task. Of course the most common method of determining credibility is to require the trier of fact to observe the demeanor of the witnesses. Alternatively, when the ultimate trier of fact has not seen and heard the witnesses, credibility is accounted for by requiring the trier of fact to afford substantial deference to the factual determination of the judge or examiner who did hear the witnesses. *See, e.g.*, the doctrine requiring appellate courts to defer to trial

court findings of fact unless "clearly erroneous." FED. R. CIV. P. 52(a); *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948); *Aunt Mid, Inc.* v. *Fjell-Oranje Lines*, 458 F.2d 712, 716 (7th Cir.), *cert. denied*, 409 U.S. 877 (1972); *S. Buchsbaum & Co.* v. *Federal Trade Commission*, 153 F.2d 85, 88 (7th Cir.), *vacated on request of parties*, 328 U.S. 818 (1946). *See also* FED. R. CIV. P. 53(e)(2), requiring the district court to accept a master's findings of fact unless clearly erroneous.

Neither of these procedural devices for assessing credibility was employed in this case. First, the statute itself prohibits any reliance on the latter procedure of according substantial deference to the findings of the individual who heard the evidence. The statute expressly requires the district judge to make a de novo determination of contested issues of fact—a mandate incompatible with the practice of according deference sufficient to ensure that demeanor evidence is adequately weighted. And although the statute would not have prevented reliance on the alternate device—hearing the testimony—the judge exercised his discretion not to hear it and made his determination on the written record alone.

Our reading of the record convinces us of the wisdom of the traditional practice. The record here does not reveal a pattern of facts that exposes the defendant's testimony as wholly incredible. Thus the truth cannot be derived from this written record without an intolerably high margin of error—a margin of error that time-honored tradition teaches can be substantially reduced by simply requiring the trier of fact to hear and observe the witnesses.

Prior precedents uniformly support our conclusion that the responsibility for the hearing and the decision must be vested in the same judge in a criminal case where credibility is essential. This rule of decision emerges in several classes of cases. Of most direct relevance, the rule has been applied in cases involving references to magistrates. In *Noorlander* v. *Ciccone*, 489 F.2d 642, 648-49 (8th Cir. 1973), the Eighth Circuit held that although evidentiary hearings in habeas cases could be referred to magistrates under the Act, Due Process required that if a defendant objected to the magistrate's determination of a material fact, "an Article III judge . . . [must] personally take the testimony of the witnesses, determine their credibility and decide for himself what the facts are." *Id.* at 648.[8] The Ninth Circuit, in *United States* v. *Bergera*, 512 F.2d 391 (9th Cir. 1975), stated that absent deference to the magistrate's recommendation,[9] Due Process requires the judge to hear the testimony and prohibits a decision based solely on the transcript. *Id.* at 394. The same result

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[8] Although a Due Process case, *Noorlander* was actually decided on the Due Process right of the party to have his case heard by an Article III judge. Here we decide only that defendant had a Due Process right to a meaningful hearing.

[9] The court in *Bergera* suggests that its prior decision in *Campbell* v. *United States District Court*, 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974), permitting the trial

was reached by the First Circuit in *O'Shea* v. *United States*, 491 F.2d 774, 778 (1st Cir. 1974) (grounds for decision not stated). *Cf. McKinney* v. *Parsons*, 488 F.2d 452 (5th Cir. 1974). Although not decided under the United States Magistrates Act, Judge Weinstein found, in a comprehensive opinion, that lawyers were denied Due Process by New York, disciplinary proceedings which provided a testimonial hearing only before a magistrate, and not before the judge responsible for a de novo determination. *Mildner* v. *Guloota*, 405 F. Supp. 182, 201-33 (E.D. N.Y. 1975) (dissenting opn.), *aff'd mem.*, 425 U.S. 901 (1976). *See also United States* v. *Vater*, 259 F.2d 667, 674 (2d Cir. 1958) (dissenting opn.) (Lumbard, J.).

This circuit has applied this principle in another line of cases. In *Smith* v. *Dental Products Co.*, 168 F.2d 516 (7th Cir. 1948), and *S. Buchsbaum & Co.* v. *Federal Trade Commission*, 153 F.2d 85 (7th Cir.), *vacated on request of parties*, 328 U.S. 818 (1946), we held that when a judge who held a hearing dies before ruling, a successor judge may not rely on the transcript of the hearing to render a decision.

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court to *accept* the magistrate's recommendation without rehearing the evidence, is not inconsistent. 512 F.2d at 392. We are in total accord with the court's conclusion in *Bergera* that Due Process is only satisfied if the trial court defers to the magistrate or rehears the evidence. We do not not believe however that the degree of deference suggested by *Bergera* and Due Process is consistent with the statutory requirement of a de novo determination.

Due Process requires that the witnesses be heard by the successor judge. The same result has been reached in other circuits on various grounds. *See United States* v. *Nugent*, 100 F.2d 215, 217 (6th Cir. 1938), *cert. denied*, 306 U.S. 648 (1939); *Bromberg* v. *Moul*, 275 F.2d 574 (2d Cir. 1960). *See also* FED. R. CIV. P. 63; FED. R. CRIM. P. 25; 7 MOORE'S FEDERAL PRACTICE ¶ 63-05 at 63-9 (2d Ed. 1978).

Finally we rely on Judge Friendly's decision in *United States ex rel. Graham* v. *Mancusi*, 457 F.2d 463 (2d Cir. 1972). In *Mancusi*, the defendant challenged a New York procedure permitting an appellate court to enter a conviction for a lesser offense when improperly admitted evidence would require reversal of the offense for which the defendant was convicted. The Second Circuit found this procedure constitutionally deficient, reasoning that the appellate court was assuming the role of the decider of fact without benefit of observing the evidence. Judge Friendly stated that:

> Due process forbids that, when an issue of fact is presented, a man should be sent to prison without the trier of the facts having heard his accusers and himself, if he desires to testify, and weighing their credibility in the light of their demeanor on the stand. . . . It . . . [is] for the judge who saw and heard the witnesses at the trial . . . to determine where the truth lay—not for appellate judges reading a cold record.

Id. at 469-70.

We are aware of no persuasive authority to the contrary. Some decisions in the administrative context have permitted the trier of fact to render a judgment on the basis of a written record. In *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967), Judge Friendly found that no Supreme Court decision "suggests that the decider must actually hear the witnesses or be furnished a report on their credibility; the thrust is quite the opposite." *Id.* at 132. But in *Mancusi*, Judge Friendly specifically limited his opinion in *Utica Mutual Insurance Co.*, stating:

> [I]n criminal cases Chief Justice Hughes' much cited statement, "The one who decides must hear," *Morgan* v. *United States*, 298 U.S. 468 (1936), applies in full force, *without the qualifications* that have been recognized for certain civil and administrative proceedings. *Cf. Utica Mutual Ins. Co.* v. *Vincent*. . . .

457 F.2d at 469 (emphasis supplied).

Nor do we believe that any case decided under the Magistrates Act advises a contrary result. *Mathews* v. *Weber*, 423 U.S. 261 (1976), cited by the government, upheld the authority of a magistrate to make an initial finding on the substantiality of the evidence supporting a social security determination. The district court judge in *Mathews* was in a position to review meaningfully the recommendations of the magistrate since the record for decision was closed, *i.e.*, the magistrate did not conduct any hearings. As a result, demeanor and veracity were not issues to be

determined by the magistrate or the judge. *Compare Goldberg* v. *Kelly*, 397 U.S. 254 (1970), *with Richardson* v. *Perales*, 402 U.S. 389 (1971).

Campbell v. *United States District Court*, 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974), decided before the 1976 amendments, did suggest that it would be constitutional to permit the trial court to accept the magistrate's findings without a new hearing. We believe however that the Ninth Circuit in its subsequent opinion in *United States* v. *Bergera*, 512 F.2d 391 (9th Cir. 1975), modified the constitutional import of *Campbell* in a way that substantially conforms with our holding here.[10]

Finally, we do not believe that Chief Justice Burger's dissenting opinion in *Wingo* v. *Wedding*, 418 U.S. 461 (1974), advises a contrary conclusion as argued by the government. In *Wingo*, the majority of the Supreme Court determined that the United States Magistrates Act, as then in force, did not permit the district court to refer evidentiary hearings on habeas petitions to magistrates. In a dissenting opinion, the Chief Justice concluded that the Act did permit the reference (as the later amendment now clearly provides). Although he also concluded that so construed, the Act was constitutional, we do not read the Chief Justice's opinion to say that when credibility is essential to the disposition of con-

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[10] *See* note 9 *supra*. We also do not read *White* v. *Estelle*, 556 F.2d 1366 (5th Cir. 1977), to reach a contrary result since the parties apparently raised no constitutional objections to the reference.

tested issues the trial court can constitutionally dispense with a hearing. *Id.* at 486-87. That issue was not addressed.

We readily accept the Chief Justice's suggestion that the Act's provisions permitting magistrates to conduct hearings on motions to suppress are constitutional. Congress did not require the trial court to determine this case on the basis of a written record alone. We decide only that the district court cannot constitutionally exercise its discretion to refuse to hold a hearing on contested issues of fact in a criminal case where credibility is crucial to the outcome. Whether the district court satisfies this constitutional requirement by prohibiting references of motions to suppress, or simply requires a hearing of the testimony if an objection is made to a recommended finding, is a matter appropriately resolved by the lower court through its rulemaking power.

The conviction is reversed and remanded for a new hearing on the motion to suppress before the district court judge.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

OPINION BY JUDGE SPRECHER

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 6, 1979

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

No. 78-1350

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

HERMAN RADDATZ, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Crim. No. 77 CR 325—Nicholas J. Bua, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, and REMANDED, for a new hearing on the motion to suppress before the District Court judge, in accordance with the opinion of this court filed this date.

APPENDIX C

CORRECTED on May 22, 1979

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 4, 1979

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. Robert A. Sprecher, Circuit Judge

Hon. Harlington Wood, Jr., Circuit Judge

No. 78-1350

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

HERMAN RADDATZ, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 77 CR 325—Judge Nicholas J. Bua

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by the plaintiff-appellee and the response filed by the defendant-appellant, a vote of the

active members of the Court have voted to deny a rehearing *in banc.** All of the judges on the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Judge Philip W. Tone did not participate in the consideration of the petition for rehearing *in banc.*

* Chief Judge Fairchild and Judge Pell voted to grant rehearing *in banc.*

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 CR 325

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HERMAN L. RADDATZ, DEFENDANT

Before Honorable Nicholas J. Bua, Judge
United States District Court

ORDER

The defendant, Herman L. Raddatz, was indicted for violation of Title 18, United States Code, Section 922(h)(1). The cause was tried to the court without a jury on stipulated facts. Prior to ruling, the court must decide two pending motions. They are: 1) defendant's motion to dismiss the indictment; and, 2) defendant's motion to strike surplusage from the indictment.

18 U.S.C. § 922(h)(1) provides in pertinent part:

> (h) It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; to receive any firearm or ammunition which has been shipped or transported in interstate commerce.

The maximum penalty for a violation of § 922(h)(1) is five years imprisonment and a $5,000 fine.

18 U.S.C., Appendix, § 1202 provides in pertinent part:

> Any person who—(1) has been convicted . . . of a felony, and who receives . . . in commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

"Receipt" for purposes of both § 922 and § 1202 covers the intrastate receipt of a firearm that previously had moved in interstate commerce. *Barrett* v. *United States*, 423 U.S. 212, 96 S.Ct. 498, 46 L.Ed. 2d 450 (1976); *United States* v. *Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed. 488 (1971).

Defendant moves to dismiss the indictment herein on grounds that the government's choosing to prosecute under § 922, with its attendant greater penalty, violates his Fifth Amendment rights to due process and equal protection of the law. See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 53 L.Ed. 2d 514 (1975). Moreover, defendant contends that permitting the United States Attorney to choose between two statutes proscribing identical conduct but with different permissible penalty ranges also violates the constitutional principle of separation of powers.

The government, while agreeing that both § 922 and § 1202 proscribe identical conduct relative to the receipt of firearms by felons, argues that the re-

turn of the instant indictment constitutes a proper exercise of prosecutorial discretion.

In light of the fact that Congress enacted both statutes simultaneously and without relevant change by different titles of the Gun Control Act of 1968, this court cannot now say that it was the intent of Congress that § 922(h) was to be comprehensive to the exclusion of § 1202(a)(1). See *United States* v. *Phillips*, 522 F.2d 388, 393 (8th Cir. 1975). Furthermore, our Supreme Court, both in *United States* v. *Bass*, 404 U.S. 336, 343 n.10 (1971) and in *Barrett* v. *United States*, 423 U.S. 212, 223 (1976), did not note any constitutional difficulty in the coexistence of § 922(h) and § 1202(a)(1).

Therefore, the court holds: 1) that the government's choosing to prosecute under § 922, with its attendant greater penalty, does not violate defendant's Fifth Amendment rights to due process and equal protection of the law; and 2) that permitting the United States Attorney to choose between two coexistent statutes which proscribe identical conduct relative to the receipt of firearms by felons, but with different permissible penalty ranges, does not constitute an abuse of prosecutorial discretion nor violate the principle of separation of powers. Accordingly, defendant's motion to dismiss the indictment is denied.

Defendant also moves to strike surplusage from the indictment.

Rule 7(c)(1) Fed. R. Crim. P. provides that an indictment shall be a plain, concise and definite writ-

ten statement of the essential facts constituting the offense charged.

An essential element of 18 U.S.C. § 922(h) is that the individual receiving the firearm had previously been convicted of a crime punishable by imprisonment for a term exceeding one year.

In the instant indictment, the government has set forth eight prior felony convictions of the defendant.

In light of the fact that one or more of the convictions specified in the indictment may prove to be defective; and that the government is not limited to establishing only one prior conviction where there has been a plurality of convictions; and since proof of a prior conviction is a requisite element of the offense charged, the court holds that the setting forth of more than one prior felony conviction in the indictment comports fully with Rule 7(c)(1) and does not constitute surplusage. Accordingly, defendant's motion to strike surplusage is denied.

As hereinbefore set forth, the instant cause was tried to the court without a jury on stipulated facts. Based upon the facts as stipulated, the court finds the defendant, Herman L. Raddatz, guilty as charged in the indictment beyond a reasonable doubt.

/s/ Nicholas J. Bua
NICHOLAS J. BUA
United States District Court

DATED: Feb. 6, 1978

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 CR 325

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HERMAN L. RADDATZ, DEFENDANT

Before Honorable Nicholas J. Bua, Judge
United States District Court

ORDER

Before the court is defendant's motion objecting to the referral of defendant's motion to suppress to United States Magistrate Carl Sussman for hearing.

Defendant contends that the reference to the Magistrate violates Article III of the United States Constitution and Title 28 United States Code § 636(b)(4).

In that respect, the court holds that Title 28 United States Code § 636(b)(1)(B) authorizes a district judge to designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to the court proposed findings of fact and a recommendation for the disposition of a motion to suppress evidence, notwithstanding that pursuant to § 636(b)(4) this court has not yet adopted any local rules outlining the procedures to be employed by the mag-

istrate in the performance of his duties. Section 636 (b) (4), the provision for implementing local rules, is merely for the purpose of insuring that there will be an equitable allocation of magistrate services among the various judges of the district court and to provide adequate notice to the bar as to the extent of use of magistrates by the court. There is no issue in this regard raised by the defendant.

Therefore, having read the transcript of the hearing on the motion to suppress, the proposed findings of fact, conclusions of law, and memoranda in support thereof as submitted by both sides, the report and recommendation of the magistrate, and after hearing the arguments of the parties, the court hereby accepts the recommendation of the magistrate and adopts the Government's Proposed Findings of Fact as the court's findings. The court further finds that the three statements given by the defendant and sought to be suppressed were made voluntarily.

Accordingly, the defendant's motion objecting to the referral of the motion to suppress will be denied and the motion to suppress the statements will also be denied.

ENTER:

/s/ Nicholas J. Bua
NICHOLAS J. BUA
United States District Court

DATED: December 8, 1977

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 CR 325

UNITED STATES OF AMERICA

v.

HERMAN L. RADDATZ

STIPULATION

IT IS HEREBY STIPULATED by and among THOMAS P. SULLIVAN, United States Attorney for the Northern District of Illinois, Eastern Division, and defendant, HERMAN L. RADDATZ, individually and by and through his attorney, JOAN B. GOTTSCHALL, as follows:

1. The evidence presented at the hearing on defendant's motion to suppress is adopted by the parties as if presented at the trial of this cause.

2. If Chicago Police Sergeant Monroe Vollich were called to testify, he would testify that on August 8, 1976, he responded to a radio message concerning a robbery in progress; that as he arrived at the scene, he observed defendant Herman L. Raddatz with what appeared to be a gun in his hand;

that he ordered Raddatz to drop the gun; that Raddatz appeared to do so; that Raddatz was placed under arrest for unlawful use of a weapon, a violation of Illinois law; and that subsequent to the arrest of Raddatz he recovered from the area where Raddatz had been standing a Titan, .25 caliber, semi-automatic pistol, serial number A21803 which Sergeant Vollich subsequently inventoried with the Chicago Police Department.

3. That Special Agents Paul G. Russell and Richard S. McCulloch, if called to testify respecting their interviews with defendant Raddatz on November 19, 1976 and January 12, 1977 (which interviews are more fully described in their testimony at the hearing on defendant's motion to suppress) would testify that defendant made statements to them as follows:

a. *November 19, 1976:* "Raddatz stated he remembered the night of August 8, 1976, when he was arrested by Sergeant Vollich and Officer Bach. He stated he and his wife had gone to his father's residence at 2514 North Kedzie and he ran into James D. Batson. He stated he had had trouble with Batson before and that they became involved in a fight. He stated he took a pistol from Batson and was pistol whipping him when the police arrived."

b. *January 12, 1977:* "On January 12, 1977, Raddatz was again interviewed and he retracted his statement of November 19, 1976. Raddatz said that he had not taken the subject firearm from James D. Batson on August 8, 1976, as he had previously

stated, but that he had received the subject firearm from his half brother, Art Raddatz, on or about August 1, 1976 to August 8, 1976, in Chicago, Illinois."

4. If called to testify as a witness in this case, a records custodian from the Firearms Import and Export Company, Miami, Florida would testify that his company's records, kept in the ordinary and regular course of its business, indicate that a Titan, .25 caliber, semi-automatic pistol, serial number A21803, was manufactured in Miami, Florida.

5. The following exhibits would be offered into evidence:

(1) Titan, .25 caliber, semi-automatic pistol, serial number A21803;

(2) Eight certified copies of prior felony convictions of Herman L. Raddatz;

(3) Business records, indicating that the pistol above was manufactured in Florida;

(4) Certified copy of an ATF records search, indicating that no records exist, showing Herman L. Raddatz to be relieved from

prior felon disabilities regarding receipt of firearms. (Attached hereto.)

/s/ Herman L. Raddatz,
HERMAN L. RADDATZ
Defendant

/s/ Joan B. Gottschall
JOAN B. GOTTSCHALL
Attorney for Defendant
Raddatz

THOMAS P. SULLIVAN
United States Attorney

/s/ Jeffrey J. Kent
JEFFREY J. KENT
Assistant U.S. Attorney

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

77 CR 325

UNITED STATES OF AMERICA, PLAINTIFF

v.

HERMAN RADDATZ, DEFENDANT

REPORT AND RECOMMENDATION

TO THE HONORABLE GEORGE N. LEIGHTON, one of the Judges of the United States District Court for the Northern District of Illinois.

On June 17, 1977, pursuant to Local Rules, this matter was assigned to my calendar.

I have considered all pleadings related to this matter and transmit herewith the following:

1. The Court File;
2. Transcript of Proceedings at Hearing held on July 26, 1977 through July 28, 1977;
3. Defendant's Proposed Findings of Fact and Memorandum in Support of his Motion to Suppress; and,
4. Government's Proposed Findings of Fact and Law Regarding Suppression Hearing Conducted in the Magistrate's Court Between July 26, 1977, and July 28, 1977.

RECOMMENDATION:

The three statements sought to be suppressed by the defendant occurred on August 8, 1976, November 19, 1976, and January 12, 1977.

Statement of August 8, 1976

From the defendant's own assertion, the admissibility of this statement depends upon the credibility of the testimony given by the Chicago Police Officer. I find that the testimony of Officer Monroe Vollick is credible, that the arrest was legal because made upon probable cause; and that defendant was advised of his constitutional rights at the time. Having waived his constitutional rights, the aforesaid statement is voluntary and is admissible.

Statement of November 19, 1976

I find that the Miranda warning was given and the statement made by defendant was voluntary. He was not in custody at the time; the statement was given at his home after being advised of his constitutional rights prior to making any statement.

Statement of January 12, 1977

I find that Raddatz initiated the voluntary making of the statement by telephoning the office of Alcohol, Tobacco and Firearms, stating that he wished to make a further statement. Despite the non-custodial setting, Agent Russell advised defendant of

his constitutional rights, prior to the defendant making said statement.

From the testimony I find that there is no merit to the defendant's Motion to Suppress; that the defendant Raddatz, who has eight prior felony convictions (TR 123-25), knowingly and intentionally waived his constitutional rights and thereafter provided statements on November 19, 1976, and January 12, 1977.

I find the testimony of the Alcohol, Tobacco and Firearms agent more credible, with reference to other matters raised by defendant; I find that Federal agents never advised Raddatz that charges against him would be dismissed, if he cooperated.

Accordingly, I respectfully recommend that this Court deny defendant's Motion to Suppress and that the Court adopt the Government's Proposed Findings of Fact as the Findings of the District Court.

Respectfully submitted,

/s/ Carl B. Sussman
CARL B. SUSSMAN
United States Magistrate

Dated: November 1, 1977

cc: Thomas P. Sullivan
United States Attorney

Jeffrey J. Kent
Assistant United States Attorney

Joan Gottschall
Attorney for Defendant
Federal Defender Program

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